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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

MARY BARRETT,

Plaintiff,

vs.

MARION COUNTY, PAT DONENFELD,  
and RICK SHERMAN,

Defendants.

) Civ. No. 07-6337-TC

) OPINION AND ORDER

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Coffin, Magistrate Judge:

Defendants move to dismiss and strike portions of plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6) and 12(f) (#12), and to strike plaintiff's declaration (#30). For the reasons that follow, defendants' motion to dismiss is granted in part and denied in part, and the motion to strike is denied.

Background

Plaintiff, a former employee of defendant Marion County,

1 filed a complaint alleging violations of state and federal law,  
2 including Title VII, the Age Discrimination in Employment Act,  
3 the Americans with Disabilities Act, intentional infliction of  
4 emotional distress, and due process. Defendants seek to dismiss  
5 untimely and unsupported claims or, in the alternative, to strike  
6 those claims from the complaint.

### Standard

Dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is appropriate where it appears beyond doubt that the plaintiff can prove no set of facts to support the claim that would entitle her to relief. Keniston v. Roberts, 717 F.2d 1295, 1300 (9th Cir. 1983) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Moreover, "[m]aterial allegations in a complaint must be taken as true and viewed in the light most favorable to the plaintiff." Geraci v. Homestreet Bank, 347 F.3d 749, 751 (9th Cir. 2003) (citing Daviton v. Columbia/HCA Healthcare Org., 241 F.3d 1131, 1133 n. 1 (9th Cir. 2001)).

19 Fed. R. Civ. P. 12(f) allows a court to order stricken from  
20 any pleading "any redundant, immaterial, impertinent, or  
21 scandalous matter." Sidney-Vinstein v. A.H. Robins Co., 697 F.2d  
22 880, 885 (9th Cir. 1983). "[T]he function of a 12(f) motion to  
23 strike is to avoid the expenditure of time and money that must  
24 arise from litigating spurious issues by dispensing with those  
25 issues prior to trial[.]" Id. at 885.

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1                                                                          Discussion

2                                                                          I. ADA, ADEA, and Title VII Claims

3                                                                          Plaintiff makes federal claims for disability discrimination  
4                                                                          under the American with Disabilities Act, 42 U.S.C. §§ 12101-  
5                                                                          12213 ("ADA"), and hostile work environment and retaliation due  
6                                                                          to age and sex under the Age Discrimination in Employment Act, 29  
7                                                                          U.S.C. §§ 621-634 ("ADEA") and Title VII of the Civil Rights Act  
8                                                                          of 1964, 42 U.S.C. § 2000e-2(a)(1) ("Title VII"). Defendants  
9                                                                          contend that plaintiff failed to exhaust her administrative  
10                                                                                 remedies and that those claims must therefore be dismissed.

11                                                                          To bring a claim in federal court under Title VII, the ADA,  
12                                                                          or the ADEA, a plaintiff must first exhaust administrative  
13                                                                          remedies by filing a timely charge with the Equal Employment  
14                                                                          Opportunity Commission ("EEOC") or the state agency to whom  
15                                                                          investigative authority has been delegated. 42 U.S.C. § 2000-e-  
16                                                                          5(e)-(f) (Title VII); 42 U.S.C. § 12117(a) (ADA); 29 U.S.C. §  
17                                                                          626(d) (ADEA). "[T]he administrative charge requirement serves  
18                                                                          the important purposes of giving the charged party notice of the  
19                                                                          claim and narrowing the issues for prompt adjudication and  
20                                                                          decision." B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1099 (9th  
21                                                                                  Cir. 2002).

22                                                                          When a plaintiff seeks judicial relief for claims not listed  
23                                                                          in the original charge, the complaint "nevertheless may encompass  
24                                                                          any discrimination like or reasonably related to the allegations  
25                                                                          of the . . . charge." Oubichon v. North Am. Rockwell Corp., 482  
26                                                                          F.2d 569, 571 (9th Cir. 1973). Subject matter extends over  
27                                                                          allegations that fell within the scope of the agency's actual  
28                                                                          investigation or an investigation which can reasonably be

1 expected to grow out of the allegation of discrimination.  
2 B.K.B., 276 F.3d at 1100; see also Sosa v. Hiraoka, 920 F.2d  
3 1451, 1456 (9th Cir. 1990) (the court "must inquire whether the  
4 original EEOC investigation would have encompassed the additional  
5 charges made in the court complaint but not included in the EEOC  
6 charge itself").

7 A plaintiff's claims are reasonably related to allegations  
8 in the charge "to the extent that those claims are consistent  
9 with the plaintiff's original theory of the case." B.K.B., 276  
10 F.3d at 1100. While also considering the principles of notice  
11 and fair play, the court construes the language of the charges  
12 "with utmost liberality since they are made by those unschooled  
13 in the technicalities of formal pleading." Id. (internal  
14 quotations omitted). "It is appropriate to consider such factors  
15 as the alleged basis of the discrimination, dates of  
16 discriminatory acts specified within the charge, perpetrators of  
17 discrimination named in the charge, and any locations at which  
18 discrimination is alleged to have occurred." Id.

19 The "crucial element of a charge of discrimination is the  
20 factual statement contained therein." Id. The question of  
21 whether a claim has been sufficiently exhausted "must focus on  
22 the factual allegations made in the charge itself, describing the  
23 discriminatory conduct about which a plaintiff is grieving."  
24 Freeman v. Oakland Unified Sch. Dist., 291 F.3d 632, 637 (9th  
25 Cir. 2002). That inquiry will reveal the actual focus of the  
26 administrative charge and the scope of the claims exhausted. Id.

27 A. ADA

28 On her March 2007 BOLI Employment Discrimination

1 Questionnaire, plaintiff checked both the "sex" and "age" boxes,  
2 but not disability. She also left the disability complaints page  
3 blank. However, she mentioned a "back injury" on the injured  
4 worker complaint page. In addition, she had submitted a letter  
5 shortly before the charge was drafted detailing not only  
6 instances of perceived sex discrimination, but also a paragraph  
7 indicating that plaintiff asked her supervisor if she could  
8 carry less weight for over one year "as my back was hurting  
9 more." She stated that a male colleague was allowed to carry  
10 less weight and to write reports by hand. She detailed her  
11 workers' compensation claim and eventual accommodation. She also  
12 stated that she "filed with the ADA committee for the county and  
13 am unable to meet the requirements. I have responded to the ADA  
14 committee and declined the option that was given to me."

15 In response to BOLI's request for more detailed information,  
16 plaintiff asserts that she misplaced her response letter and  
17 mailed it when she found it, which was more than the required 15  
18 days later. Those responses detail possible age, sex, and  
19 disability discrimination. In a section discussing her  
20 experience with the ADA Committee, plaintiff said that she was  
21 asked to choose between four accommodations; she declined the  
22 accommodation that was offered. Plaintiff explained her belief  
23 that her supervisor knew of her requested accommodation and was  
24 "singling [her] out with a different time than my coworkers."  
25 She asserts that she was required to turn in her reports at the  
26 end of the day, while coworkers had until the next morning. She  
27 noted feeling "a sense of retaliation for filing the workers  
28 comp. claim and HR complaints," and stated that it was "because

1 of my supervisor not working with me to find an alternative to  
2 packing a computer on my back that I filed a workers comp. claim  
3 and ADA claim. I do not feel he will be willing to extend my  
4 time inputting time."

5 The official BOLI complaint stated that plaintiff alleged  
6 "disparate treatment because of my sex and/or age." The  
7 complaint included a brief mention of plaintiff's difficulty  
8 carrying weight on her back, stating that the computer "is heavy  
9 and it is difficult for me to carry the computer because it makes  
10 my back ache. A male coworker had been allowed to write his  
11 reports with pen and paper instead of carrying the computer from  
12 2004 through March 2007. I asked that I be allowed to write  
13 field reports with pen and paper in lieu of carrying the  
14 computer. My request was denied." Defendants contend that the  
15 BOLI charge does not contain allegations of disability  
16 discrimination or any reference to an alleged physical disability  
17 and argue that plaintiff voluntarily limited the scope of the  
18 investigation even after being "warned of the consequences."

19 Plaintiff's disability discrimination claim is reasonably  
20 related to her general allegations of discrimination or can  
21 reasonably be expected to grow out of those allegations. Even if  
22 they are considered "additional" claims, they are consistent with  
23 plaintiff's overall theory—that she was discriminated against  
24 based upon her sex, age, disability, or some combination thereof.  
25 Because we are to construe the charge liberally, we deny  
26 defendants' motion to dismiss the disability claim.

27       B. ADEA and Title VII

28       The BOLI charge included disparate treatment allegations

1 based upon plaintiff's age and gender, but it did not include  
2 allegations of hostile work environment or retaliation based upon  
3 those characteristics, as plaintiff's complaint now does.  
4 Defendants contend that, even if this court considers the  
5 untimely additional materials, those materials simply mention one  
6 allegation of retaliation based on age or gender. Defendant  
7 argues that plaintiff did not provide facts in any of her  
8 materials that support a hostile work environment or retaliation  
9 theory based upon age or sex.

10 In order to make a hostile environment sex discrimination  
11 claim, plaintiff must show that she was subjected to verbal or  
12 physical conduct of a sexual nature, that the conduct was  
13 unwelcome, and that the conduct was "sufficiently severe or  
14 pervasive to alter the conditions of her employment and create an  
15 abusive work environment." Vasquez v. County of Los Angeles, 349  
16 F.3d 634, 642 (9th Cir. 2003). A hostile environment may result  
17 from a single instance of sexual harassment if the harassing  
18 conduct is sufficiently severe. Brooks v. City of San Mateo, 229  
19 F.3d 917, 925-27 (9th Cir. 2000).

20 At the motion to dismiss stage, plaintiff need not support  
21 her allegations with evidence, but her complaint must allege  
22 sufficient facts to state the elements of a hostile work  
23 environment claim. See Williams v. Boeing Co., 517 F.3d 1120,  
24 1130 (9th Cir. 2008) ("Even though heightened pleading is not  
25 required in discrimination cases, the complaint must still 'give  
26 the defendant fair notice of what the plaintiff's claim is and  
27 the grounds upon which it rests.'" (quoting Swierkiewicz v.  
Sorema N.A., 534 U.S. 506, 512, 2002)). The ADEA hostile

1 environment standard is identical. Sischo-Nownejad v. Merced  
2 Cnty. Coll. Dist., 934 F.2d 1104, 1109 (9th Cir. 1991).

3 Even when her supplemental materials are considered,  
4 plaintiff fails to make a claim as a matter of law for hostile  
5 work environment based on age or sex. Plaintiff alleges that her  
6 supervisor made three comments ("I send Devon to the CD's nurses  
7 on outbreaks because he is 'candy to their eyes,'" "I would never  
8 have women second in water," and "I would never let a woman drive  
9 my truck") that, even when taken together, do not meet the severe  
10 and pervasive standard. Furthermore, although plaintiff's  
11 written materials contain her suspicion that she was passed over  
12 because of her age, there is no allegation of hostile work  
13 environment based upon age. The claims for hostile environment  
14 based upon age and sex are dismissed.

15 In contrast, plaintiff's retaliation claims based upon age  
16 and gender survive because the supplemental written materials  
17 contain numerous allegations of retaliation. The BOLI claim does  
18 not mention retaliation; however, the retaliation allegations are  
19 reasonably related to the general allegations of discrimination  
20 or can reasonably be expected to grow out of those allegations.  
21 Even if they are considered "additional" claims, they are  
22 consistent with plaintiff's overall theory—that she was  
23 discriminated against based upon her sex, age, disability, or  
24 some combination thereof, and that her former employer retaliated  
25 against her when she reported it. Because we are to construe the  
26 charge liberally, we deny the motion to dismiss those portions of  
27 plaintiff's claims based on a retaliation theory.

28 II. Claims related to plaintiff's subsequent termination

1           The parties agree that plaintiff has not filed a BOLI charge  
2 relating to her subsequent termination and that those claims  
3 should be dismissed. Those claims that relate to retaliation  
4 based on termination under Title VII and the ADA are therefore  
5 dismissed without prejudice.

6           III. Age and gender disparate treatment claims

7           Defendants argue that plaintiff's disparate treatment claims  
8 based on age and gender are barred by the applicable statutes of  
9 limitations. Plaintiff's federal disparate treatment claims may  
10 not be based on acts predating July 12, 2006, or 300 days prior  
11 to filing a charge with the EEOC on May 8, 2007. 42 U.S.C. §  
12 2000e-5(1) (Title VII); 29 U.S.C. § 626(d)(2) (ADEA).  
13 Defendants' motion to dismiss claims of disparate treatment that  
14 occurred prior to July 12, 2006, is granted.

15           Plaintiff points out that an employee may use prior acts as  
16 background evidence in support of a timely claim. See Nat'l R.R.  
17 Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). However,  
18 plaintiff's specific assertion, that the evidence can be used to  
19 support her hostile environment and due process claims, is  
20 misplaced because those claims are now dismissed.

21           IV. State law claims

22           Plaintiff makes several claims based on state law, including  
23 state statutory discrimination, intentional infliction of  
24 emotional distress, and whistle blowing. Defendants contend that  
25 several of those claims are barred under the Oregon Tort Claims  
26 Act ("OTCA"). The OTCA requires that a plaintiff submit notice  
27 to a public body of an injury or loss allegedly caused by the  
28 public body or its officials, employees, or agents in breach of

1 a legal duty within 180 days of the date that the injury or loss  
 2 occurred. ORS 30.275(2). If timely notice is not provided, no  
 3 civil tort action may be maintained. ORS 30.295(1).

4 Plaintiff alleges that she filed a "second" tort claims  
 5 notice on or about March 29, 2007. The complaint does not  
 6 reference a "first" or previous notice. Because there is no  
 7 evidence in the record of an earlier notice, we assume that  
 8 occurrences of discrete acts of discrimination occurring before  
 9 September 30, 2006 are not actionable under the OTCA.

10 Plaintiff makes a "continuing tort" argument, contending  
 11 that she may seek recovery for the cumulative effect of wrongful  
 12 behavior, including acts that occurred before that date, citing  
 13 Griffin v. Tri-County Metro. Transp., 831 P.2d 42 (Or. App. 1992)  
 14 , rev'd in part on other grounds, 870 P.2d 808 (Or. 1994) as  
 15 support. It is true that "Oregon cases have used a continuing  
 16 tort analysis to allow claims that would otherwise be time-  
 17 barred." Id. at 46. "[A]t the heart of the continuing tort idea  
 18 is the concept that recovery is for the cumulative effect of  
 19 wrongful behavior, not for discrete elements of that conduct."  
 20 Davis v. Bostick, 580 P.2d 544, 544 (Or. 1978). In Davis, the  
 21 defendant's treatment of the plaintiff was continuous, but each  
 22 act was discrete and thus separately actionable, not merely an  
 23 element of a single tort. In Griffin, however, the separate  
 24 incidents were not discrete, but made up a "systematic pattern of  
 25 conduct, aimed at causing [the] plaintiff's eventual  
 26 termination." 831 P.2d at 46.

27 The court in Atwood v. Or. Dep't of Transp., No. CV-06-1726-  
 28 ST, 2008 WL 803020, at \*2 (D. Or. March 20, 2008), clarified that

1       the "related acts" method of establishing a continuing violation  
 2       has been invalidated; instead, discrete discriminatory acts that  
 3       occurred outside the statute of limitations are separately  
 4       actionable and time-barred, but can be used as background  
 5       evidence in support of a timely claim.<sup>1</sup> The court made clear that  
 6       the same policy rationale applies to state statutory  
 7       discrimination claims. *Id.* at \*11. Specifically, "a hostile  
 8       work environment claim seems to be exactly the kind of claim  
 9       which 'recovery is for the cumulative effect of wrongful  
 10      behavior'" (citing Bostick, 580 P.2d at 547). However, refusal  
 11      to grant accommodations and retaliation events are discrete,  
 12      separately actionable claims and are thus subject to the OTCA.  
 13      *Id.*

14           Therefore, unless a theory of continuing violation applies,  
 15       plaintiff's claims pertaining to events occurring before  
 16       September 30, 2006, are time-barred, and defendant's motion to  
 17       dismiss those claims is granted. To the extent that plaintiff  
 18       claims that incidents as a whole were a systematic pattern of  
 19       conduct that led to a specific injury, e.g., IIED or state  
 20       hostile work environment claims, then incidents occurring outside  
 21       the 180-day period are not time-barred.<sup>2</sup>

22           V. FMLA and OFLA claims

23           The parties agree that the plaintiff failed to allege facts  
 24       sufficient to support those claims, and they are dismissed for

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25  
 26       <sup>1</sup> The court was applying the rule to § 1983 and Title VII claims,  
 27       both of which plaintiff makes here.

28       <sup>2</sup> Defendants do not challenge plaintiff's state law hostile work  
 environment claims.

1 failure to state a claim.

2       VII. Due process claim

3 Plaintiff alleges that the individual defendants Donenfeld  
4 and Sherman violated her "due process rights protected by the  
5 Fourteenth Amendment" and that she was deprived of "property and  
6 liberty" as a result. A procedural due process claim requires  
7 the plaintiff to possess some liberty or property interest that  
8 would trigger federal due process protection. Bd. of Regents v.  
9 Roth, 408 U.S. 564, 569 (1972); Stretten v. Wadsworth Veterans  
10 Hosp., 537 F.2d 361, 365 (9th Cir. 1976). It is only when such  
11 an interest exists that the court determines what sort of process  
12 is constitutionally required. Stretten, 537 F.2d at 365.

13 Plaintiff does not allege facts sufficient to establish that  
14 she possessed a protected liberty interest. The complaint lacks  
15 allegations relating to termination, the reasons for termination,  
16 or whether those reasons were publicized. Cf. Roth, 408 U.S. at  
17 573 (employee entitled to notice and a hearing when fired for  
18 reasons that may seriously damage standing in the community).  
19 Reasons for dismissal that implicate a protected liberty interest  
20 include accusations of moral turpitude, such as dishonesty or  
21 immorality, that are shared with the public. Id.; Campanelli v.  
22 Bockrath, 100 F.3d 1476, 1480 (9th Cir. 1996) (stating that  
23 liberty interest is implicated when former employer publishes  
24 accusations of former coach verbally abusing his players to the  
25 point of inflicting physical and mental illness upon them).

26 Plaintiff does not allege facts sufficient to establish that  
27 she possessed a liberty interest for which appropriate process  
28 was due. The complaint lacks allegations regarding plaintiff's

1 subsequent termination. In fact, plaintiff has admitted that any  
2 allegations involving termination are premature.

3 As for plaintiff's due process claim based upon an alleged  
4 property interest, plaintiff has not established an entitlement  
5 to a government benefit. Plaintiff does not allege an interest  
6 regarding the loss of her job; therefore, continued employment  
7 cannot form the basis of any property interest claim. Plaintiff  
8 was still employed at the time she filed the complaint.

9 Plaintiff's complaint fails to allege facts sufficient to  
10 amount to a compensable due process claim. Those claims are  
11 dismissed.

12

13 Conclusion

14 For the foregoing reasons, defendants' motion to dismiss  
15 and strike portions of plaintiff's complaint (#12) is granted  
16 in part and denied in part, and defendants' motion to strike  
17 plaintiff's declaration (#30) is denied.

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19 Dated this 15<sup>+</sup> day of September, 2008.

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23 THOMAS M. COFFIN

24 United States Magistrate Judge